Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at http://about.jstor.org/participate-jstor/individuals/early-journal-content.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

in Chicago. Professor Wambaugh and Professor Frankfurter are on leave of absence, the former being a Judge Advocate in Washington, the latter being an assistant to the Secretary of War. Under these circumstances the School is particularly fortunate in having secured the services of Prof. Henry M. Bates. Mr. Bates received the degree of Ph.B. from the University of Michigan in 1890 and LL.B. from Northwestern University in 1892. From 1892 to 1903 he practiced law in Chicago. From 1903 until his present appointment he was a member of the Faculty of the University of Michigan Law School, as a professor for seven years and since 1910 as Dean.

The changes in the Faculty have made necessary the following adjustment of the curriculum: Professor Wambaugh's course in Constitutional Law is being given by Professor Bates, Agency by Prof. Joseph Warren and Insurance by Assistant Professor Chafee. Professor Kales's course in Property II is being given by Prof. Joseph Warren and Property III by Professor Westengard. Professor Frankfurter's course in Public Utilities is being given by Dean Pound, Partnership by Professor Bates, and Municipal Corporations by Professor Beale.

THE LEGALITY OF ATHEISM. — Is the promotion of atheism a criminal offense at common law?[1] There are four possible grounds for holding that it is, or that under some circumstances it may be.

1. That a denial of the very existence of God is an offense against God, and that in order to vindicate the majesty of God the state should punish it. This view has been distinctly rejected by the courts, both in England[2] and in the United States.[3] In so far as the offense is an offense against God, it is left for God or the Church to deal with it.

2. That the civil order is based on religion and in particular on Christianity, and that to attack religion or the fundamental doctrines of Christianity is to loosen the bonds of society and to endanger the state. This was the view taken by Lord Hale in a famous case in which he said: "To say religion is a cheat is to dissolve all those obligations whereby the civil societies are preserved; Christianity is parcel of the laws of England; and therefore to reproach the Christian religion is to speak in subversion of the law."[4] Under this view any attack upon the

[1] For a summary of the English statutes on this and related matters, see 1 HAWKINS, PLEAS OF THE CROWN (6 ed.), 11 *et seq.*; [1917] A. C. 409.

In England bequests for the saying of masses for the soul of the testator or of other persons are still held to be illegal as superstitious uses. The law is otherwise in Ireland and in Canada. But in Ireland as well as in England bequests to or for the benefit of monastic bodies are illegal. Ellard *v.* Phelan, [1914] 1 I. R. 76.

Strangely enough the Blasphemy Act of 1697 (9 & 10 WILL. III, c. 32) is still on the English statute book. By this act persons who have been educated in or have made profession of the Christian religion, who are convicted of denying the Trinity or the truth of Christianity or the authority of the Bible, are subjected to heavy penalties and disabilities. Of course the act is not actually enforced today.

[2] 4 BL. COMM. 41 *et seq.*; STARKIE, SLANDER AND LIBEL (Am. ed., 1877), § 772.

[3] State *v.* Chandler, 2 Harr. (Del.) 553 (1837).

[4] Taylor's Case, 1 Vent. 293, 3 Keb. 607, 621 (1675). The actual decision was undoubtedly right, for the defendant's words were indecent.

In a number of the cases special stress is laid on the religious sanction of a judicial

fundamental doctrines of the Christian religion is criminal and the motive and manner of the attack are immaterial.[5] This view is now repudiated by the courts.[6] It is no longer felt that it can be said that the decay of the Christian religion would mean the dissolution of the state, nor that a decorous discussion of the merits of Christianity would mean its decay.

3. That since the majority of the members of the community are Christians, an attack upon Christianity has a tendency to cause a breach of the peace.[7] Certainly the tendency to cause a breach of the peace may make conduct criminal which would otherwise be innocent.[8] But today it can hardly be said that a decorous argument against Christianity tends to cause a breach of the peace. Moreover, even conduct which tends to cause a breach of the peace is sometimes justified on grounds of public policy,[9] and surely the policy in favor of freedom of discussion of matters of vital interest to humanity is sufficient justification. But if the words are scurrilous or spoken in an insulting way or for the purpose of stirring up trouble, then indeed a justification is quite lacking.[10]

4. That an attack upon religion constitutes a public nuisance. It is a criminal offense to disturb the community by thrusting upon it something disgusting and nasty, whether that thing be a smell, a sight or an idea.[11] Hence, indecorous or contumelious language in regard to things generally regarded by the community as sacred constitutes a public nuisance.[12] But a decorous discussion of such things is no nuisance.[13]

---

oath. See STARKIE, SLANDER AND LIBEL (Am. ed., 1877), § 772. This argument of course loses all its force when atheists are allowed to be sworn. See STAT. 1 & 2 VICT. c. 105, § 1, and acts amendatory thereof.

[5] Regina *v.* Moxon, 4 St. Tr. (N. S.) 694 (1841) (publishing Shelley's "Queen Mab"); Reg. *v.* Petcherini, 7 Cox C. C. 79 (1856) (burning an authorized version of the Bible); Rex *v.* Williams, 26 How. St. Tr. 653 (1797) (publishing Paine's "Age of Reason"); Rex *v.* Woolston, 2 Str. 820, Fitzg. 64, 1 Barnard. 162, 266 (1779) (denial of miracles of Christ); Commonwealth *v.* Kneeland, 20 Pick. (Mass.) 206 (1838) (promulgation of pantheistic ideas); Updegraph *v.* Commonwealth, 11 S. & R. (Pa.) 394 (1824) (denial of infallibility of the Bible). This view is accepted by STEPHEN, DIGEST OF CRIMINAL LAW (6 ed., 1904), 125.

[6] Regina *v.* Bradlaugh, 15 Cox C. C. 217 (1883); Regina *v.* Ramsay, 15 Cox C. C. 231 (1883); Rex *v.* Boulter, 72 J. P. 188 (1908). See Shore *v.* Wilson, 9 Cl. & Fin. 355, 524, 539; ODGERS, LIBEL AND SLANDER (5 ed., 1911) ch. xvii, which has a full collection of English cases; 3 WHARTON, CRIMINAL LAW (11 ed., 1912), 2121.

[7] Of course true disciples of Christ would not resort to the illegal use of force. "The professing and devout Christian would indeed look on the scene more in sorrow than in anger, but his relatives and friends, who are not strictly professors of Christianity or members of any church or sect, and the great mass who have been educated in the Christian's belief, though not professing to act up to it, would probably do as outraged and insulted men have in all ages been accustomed to do." State *v.* Chandler, 2 Harr. (Del.) 552.

[8] Wise *v.* Dunning, [1902] 1 K. B. 167.

[9] Beatty *v.* Gillbanks, 15 Cox C. C. 138 (1882).

[10] Rex *v.* Boulter, 72 J. P. 188 (1908); State *v.* Chandler, 2 Harr. (Del.) 553 (1837); People *v.* Ruggles, 8 Johns. (N. Y.) 290 (1811). It is an indictable offense to ridicule the religious views of a minority of the community. Commonwealth *v.* Haines, 4 Pa. L. J. 17 (1824).

[11] BEALE, CASES ON CRIMINAL LAW (3 ed.), 81–102.

[12] People *v.* Ruggles, 8 Johns. (N. Y. 291) (1811); 2 BISHOP, NEW CRIMINAL LAW, § 74.

[13] Regina *v.* Bradlaugh, 15 Cox C. C. 217 (1883); Rex *v.* Boulter, 72 J. P. 188 (1908).

It may therefore be concluded that today the promotion of atheism in decorous ways is not a crime. To this even Lord Finlay agrees.[14]

Granting that the promotion of atheism is not a criminal offense, is it illegal in any sense? In 1850, in *Briggs* v. *Hartley*,[15] the court held illegal as inconsistent with Christianity a legacy "for the best original essay on natural theology, treating it as a science, and demonstrating its adequacy and sufficiency when so treated and taught to constitute a true, perfect, and philosophical system of universal religion." In 1867, in *Cowan* v. *Milbourn*,[16] the court held illegal a contract to let rooms for the purpose of the delivery of lectures on such subjects as "The Character and Teachings of Christ: the former defective, the latter misleading." [17] Similarly in a Canadian case, decided in 1878, a contract to let a hall for the delivery of lectures containing an attack upon the fundamental doctrines of Christianity was held illegal.[18] In the well-known Pennsylvania case of *Zeisweiss* v. *James*,[19] decided in 1870, Sharswood, J., was of the opinion that a legacy to the "Infidel Society of Philadelphia hereafter to be incorporated . . . for the purpose of building a hall for the free discussion of religion, politics, etc.," was illegal. In *Lawrence* v. *Smith*[20] Lord Eldon refused to enjoin a pirated edition of a medical book because it seemed to throw some doubt on the doctrine of the immortality of the soul. It shows a remarkable openness of mind that in spite of these decisions the House of Lords was able to reach the result it did reach in *Bowman* v. *Secular Society, Limited*, [1907] A. C. 406, upholding a bequest to a registered company organized to promote atheistic doctrines, and for the first time establishing in the English law a real freedom of decorous religious discussion.

One interesting and more doubtful question yet remains. Granting that the promotion of atheism is not criminal or in any way illegal, is it a charitable object? That point it was not necessary to decide in the Bowman Case where the fund bequeathed was to be paid to a registered company. If, however, the fund had been given to trustees to be expended in the promotion of atheism, the question whether such an object is charitable would have been presented. For unless it were held to be a charitable trust, it would be invalid under the doctrine of *Morice* v. *Bishop of Durham*,[21] which requires a definite beneficiary in non-charitable trusts, and also as violating the principle of the rule against perpetuities. Lord Parker touching on this question in the Bowman Case came to the conclusion that such a trust is not char-

---

[14] Bowman *v.* Secular Society, Limited, [1917] A. C. 406, 423. See Recent Cases, page 313.

[15] 19 L. J. Ch. 416. See also Kinsey *v.* Kinsey, 26 Ont. 99 (1894).

[16] L. R. 2 Ex. 230, 36 L. J. Exch. (N. S.) 124, 16 L. T. (N. S.) 290, 15 Week. Rep. 750.

[17] Lord Parker suggests that possibly Cowan *v.* Milbourn may be upheld on the ground that the lectures had a tendency to cause a breach of the peace. Bowman *v.* Secular Society, Limited, [1917] A. C. 406, 447.

[18] Pringle *v.* Napanee, 43 U. C. Q. B. 285.

[19] 63 Pa. 465. Compare Manners *v.* Philadelphia Library Co., 93 Pa. 165.

[20] Jac. 471 (1822). See also Murray *v.* Benbow, 4 St. Tr. (N. S.) 1410 (1822), where Lord Eldon refused to restrain the defendant from publishing a pirated edition of Lord Byron's "Cain."

[21] 10 Ves. 521.

itable.[22] It was expressly so decided a few years ago in an Australian case.[23] A bequest was there made to the "Incorporated Body of Freethinkers of South Australia." The chief doctrine of that society was "that science provides for life, and that materialism can be relied upon in all phases of society." The corporation had ceased to exist at the time of the death of the testator, and the question was whether the legacy could be applied *cy pres*. The court held that the purposes of the society were not charitable and that it could not be so applied. It may be difficult, though perhaps not impossible,[24] to say that the promotion of atheism is the advancement of religion. Certainly, however, it may well be held to be the promotion of education, for education is not confined to matters taught and learned in the school-room. At any rate, it may be held to fall within that broad class of cases where the purpose is "beneficial to the community." [25] Of course the fact that the testator sincerely believes that the community will be benefited by his scheme is not enough to make the scheme charitable. On the other hand, the fact that the members of the court and the great majority of the members of the community think that the community will not be benefited is not enough to prevent the scheme from being charitable. The courts have upheld as charitable, bequests for the promotion of vegetarianism,[26] for the suppression of vivisection,[27] for the spread of woman's suffrage,[28] for the publication of the doctrines of Henry George,[29] for the furtherance of Conservative principles when accompanied by religious and mental improvement,[30] for the propagation of the writings of Joanna Southcote[31] (who claimed that she would give birth to a new Messiah and whose writings the court thought not "inconsistent with Christianity"), for the promotion of Unitarianism,[32] for the promotion of Christian Science,[33] for the advancement of spiritualism,[34] and for the furtherance of "the broadest interpretation of metaphysical thought." [35] Surely if all these objects, whether wise or unwise, are charitable, the furtherance of earnest inquiry into the fundamental questions of religion is likewise

---

[22] Bowman *v.* Secular Society, Limited, [1917] A. C. 406, 440 *et seq.*

[23] *In re* Jones, [1907] S. Aust. L. R. 190. A provision in a bequest for the founding of a college that ecclesiastics should be kept off the premises does not invalidate the bequest. Vidal *v.* Philadelphia, 2 How. (U. S.) 127, 198 (1844).

[24] In Knight's Estate, 159 Pa. 500 (1855), the court was of the opinion that a legacy for such a purpose was so far a bequest for the promotion of religion as to be void under a statute invalidating bequests made less than one month before the testator's death.

[25] See Commissioners of Income Tax *v.* Pemsel, [1891] A. C. 531, 583.

[26] *In re* Cranston, [1898] 1 I. R. 431.

[27] *In re* Foveaux, [1895[2 Ch. 501.

[28] Garrison *v.* Little, 75 Ill. App. 402. But see Jackson *v.* Phillips, 14 Allen (Mass.) 539.

[29] George *v.* Braddock, 45 N. J. Eq. 757, reversing 44 N. J. Eq. 124.

[30] *In re* Scowcroft, [1898] 2 Ch. 638.

[31] 31 Beav. 14, 31 L. J. Ch. (N. S.) 767, 8 Jur. (N. S.) 663, 6 L. T. (N. S.) 525, 10 Week. Rep. 642.

[32] Shore *v.* Wilson, 9 Cl. & Fin. 355 (1842).

[33] Chase *v.* Dickey, 212 Mass. 555, 99 N. E. 410; Glover *v.* Baker, 76 N. H. 393, 83 Atl. 916.

[34] Jones *v.* Watford, 62 N. J. Eq. 339, 50 Atl. 180, affirmed in 64 N. J. Eq. 785, 53 Atl. 397.

[35] Vineland Trust Co. *v.* Westendorf, 86 N. J. Eq. 343, 98 Atl. 314 (1916).

such. It makes no difference that the object is to present only one side of the question; innumerable religious trusts have been established to present other sides. It makes no difference that most people regard that side as the wrong side, if rational persons can and do regard it as the right side and can and do believe that its advancement will benefit mankind. At the end of the eighteenth century a learned writer said that no person in a Christian country can complain of the prohibiting of a denial of Christianity, for "even an infidel must acknowledge that no benefit can be derived from the subversion of a religion which enforces the best system of morality." [36] But the sincere disbeliever does not acknowledge this. On the contrary, he believes that the spread of what he regards as truth and the removal of what he regards as superstition would conduce to the benefit of mankind. Surely the truth will prevail though the courts do not attempt to decide *a priori* what is the truth.

LIABILITY OF OCCUPIERS OF PREMISES TOWARD TRESPASSERS. — In his last written utterance Dean Thayer spoke of the "powerful weapon" which "the modern law of negligence places in the hands of the injured person and how little its full scope has been realized until recently," [1] and he showed how many questions of which we have been seeking arbitrary solutions under the doctrine of *Rylands* v. *Fletcher*, or by setting up special categories of carrier and passenger, were really to be dealt with on a broad simple principle of liability.[2] Decisions on the liability of occupiers of premises toward trespassers are affording another example.

A person who comes upon premises in the control of another may be injured by the latter's negligent management of an active force, or he may be injured by reason of the condition of the premises upon which he comes. If the former, it ought not to matter in what capacity he comes. It should be a question whether a reasonable man managing the force which the occupier of the premises was operating would have anticipated injury to the person in question under the circumstances. If so the ordinary principle of liability should hold him to repair the injury following from his want of due care. Whether the person injured was invitee, licensee,[3] perceived trespasser,[4] anticipated but not perceived trespasser [5] or

---

[36] SWIFT, SYSTEM OF LAWS OF CONN., vol. 2, 323.

[1] "Liability Without Fault," 29 HARV. L. REV. 801, 805.

[2] *Ibid.*, 805, 813.

[3] Gallagher *v.* Humphrey, 6 L. T. R. (N. S.) 684; De Haven *v.* Hennessey, 137 Fed. 472; Pomponio *v.* New York R. Co., 66 Conn. 528, 34 Atl. 491; Schmidt *v.* Coal Co., 159 Mich. 308, 123 N. W. 1122; Hyatt *v.* Murray, 101 Minn. 507, 112 N. W. 881; Knowles *v.* Exeter Mfg. Co., 77 N. H. 268, 90 Atl. 970; Hoadley *v.* Int. Paper Co., 72 Vt. 79, 47 Atl. 169.

[4] Rome Furnace Co. *v.* Patterson, 120 Ga. 521, 48 S. E. 166; Fields *v.* Louisville R. Co., 163 Ky. 673, 174 S. W. 41; Herrick *v.* Wixom, 121 Mich. 384, 80 N. W. 117, 81 N. W. 333; Hobbs *v.* Blanchard, 74 N. H. 116, 65 Atl. 382.

[5] Schmidt *v.* Coal Co., 159 Mich. 308, 123 N. W. 1122; Brown *v.* Boston R. Co., 73 N. H. 568, 64 Atl. 194; Magar *v.* Hammond, 171 N. Y. 377, 64 N. E. 150; Cincinnati R. Co. *v.* Smith, 22 Ohio St. 227; O'Leary *v.* Elevator Co., 7 N. D. 568, 75 N. W. 919.